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MONTANA LEGISLATIVE HISTORY

Chapter 276 19 89

Bill H 409 S _____ Original bill & history ____C

H. Committee on Judiciary			S. Committee on Judiciary		
Hearing Date(s)	Feb 03	✓ C	Hearing Date(s)	Mar 01	✓ C
		____C		Mar 06	✓ C
		____C			____C
		____C			____C
Date Out	Feb 03	✓ C		Mar 06	✓ C

Did this bill originate in an interim committee? ____Yes ____No

Committee _____ Report _____

HOUSE BILL NO. 409

INTRODUCED BY GOOD, COBB, RICE,
SPAETH, WHALEN, MERCER

IN THE HOUSE

JANUARY 25, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
JANUARY 26, 1989	FIRST READING.
FEBRUARY 3, 1989	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 4, 1989	PRINTING REPORT.
FEBRUARY 6, 1989	SECOND READING, DO PASS.
FEBRUARY 7, 1989	ENGROSSING REPORT.
FEBRUARY 8, 1989	THIRD READING, PASSED. AYES, 98; NOES, 1.
	TRANSMITTED TO SENATE.

IN THE SENATE

FEBRUARY 9, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON JUDICIARY.
	FIRST READING.
MARCH 6, 1989	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 7, 1989	SECOND READING, CONCURRED IN.
MARCH 9, 1989	THIRD READING, CONCURRED IN. AYES, 50; NOES, 0.
	RETURNED TO HOUSE WITH AMENDMENTS.

IN THE HOUSE

MARCH 11, 1989	RECEIVED FROM SENATE.
	SECOND READING, AMENDMENTS CONCURRED IN.
MARCH 13, 1989	THIRD READING, AMENDMENTS CONCURRED IN.
	SENT TO ENROLLING.
	REPORTED CORRECTLY ENROLLED.

House BILL NO. 409

INTRODUCED BY [illegible] Lee Spaeth Whalen
Mercer

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE CLIENT; AMENDING SECTION 26-1-803, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-1-803, MCA, is amended to read:

"26-1-803. Attorney-client privilege. (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

NEW SECTION. **Section 2.** Effective date. [This act] is effective on passage and approval.

-End-

INTRODUCED BILL
HB 409

APPROVED BY COMMITTEE
ON JUDICIARY

House BILL NO. 409

INTRODUCED BY [illegible] Ken Wyatt Whalen
Mercer

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE CLIENT; AMENDING SECTION 26-1-803, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-1-803, MCA, is amended to read:

"**26-1-803. Attorney-client privilege.** (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given ~~thereon~~ to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

NEW SECTION. **Section 2.** Effective date. [This act] is effective on passage and approval.

-End-

SECOND READING
HB 409

House BILL NO. 409

INTRODUCED BY Bd Ellis Lee Spaeth Whalen
Mercer

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE CLIENT; AMENDING SECTION 26-1-803, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-1-803, MCA, is amended to read:

"**26-1-803. Attorney-client privilege.** (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given thereon to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

NEW SECTION. **Section 2.** Effective date. [This act] is effective on passage and approval.

-End-

THIRD READING
HB 409

(4(A)

SENATE STANDING COMMITTEE REPORT

March 6, 1989

MR. PRESIDENT:
We, your committee on Judiciary, having had under consideration HB 409 (third reading copy -- blue), respectfully report that HB 409 be amended and as so amended be concurred in:

Sponsor: Good (Halligan)

1. Page 1, line 9.
Insert: "WHEREAS, a majority of courts in the United States have broadly construed the attorney-client privilege as protecting the client as well as his attorney from being compelled to disclose their confidential communications; and

WHEREAS, the United States District Court for the District of Montana, in the recent case of Lane v. All Nation Insurance Company, CV-86-054-GF (June 17, 1987), strictly construed Montana's statute regarding attorney-client privilege to allow the client to be examined concerning his confidential communications with his attorney; and

WHEREAS, the Legislature intends to amend and clarify the Montana statute to make it clear that, contrary to the Lane decision, the attorney-client privilege extends to protect the client from being required to disclose confidential communications between him and his attorney; and

WHEREAS, the courts through the common law have developed several exceptions to the attorney-client privilege; and

WHEREAS, the Legislature does not intend by this act to abolish, amend, or otherwise affect any other exceptions to the attorney-client privilege.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the statute regarding attorney-client privilege."

AND AS AMENDED BE CONCURRED IN

Signed: Bruce D. Crippen, Chairman

SENATE

scrhb409.306

HB 409

HOUSE BILL NO. 409

INTRODUCED BY GOOD, COBB, RICE,

SPAETH, WHALEN, MERCER

A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING THAT THE ATTORNEY-CLIENT PRIVILEGE APPLIES TO THE CLIENT; AMENDING SECTION 26-1-803, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, A MAJORITY OF COURTS IN THE UNITED STATES HAVE BROADLY CONSTRUED THE ATTORNEY-CLIENT PRIVILEGE AS PROTECTING THE CLIENT AS WELL AS HIS ATTORNEY FROM BEING COMPELLED TO DISCLOSE THEIR CONFIDENTIAL COMMUNICATIONS; AND

WHEREAS, THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, IN THE RECENT CASE OF Lane v. All Nation Insurance Company, CV-86-054-GF (JUNE 17, 1987), STRICTLY CONSTRUED MONTANA'S STATUTE REGARDING ATTORNEY-CLIENT PRIVILEGE TO ALLOW THE CLIENT TO BE EXAMINED CONCERNING HIS CONFIDENTIAL COMMUNICATIONS WITH HIS ATTORNEY; AND

WHEREAS, THE LEGISLATURE INTENDS TO AMEND AND CLARIFY THE MONTANA STATUTE TO MAKE IT CLEAR THAT, CONTRARY TO THE Lane DECISION, THE ATTORNEY-CLIENT PRIVILEGE EXTENDS TO PROTECT THE CLIENT FROM BEING REQUIRED TO DISCLOSE CONFIDENTIAL COMMUNICATIONS BETWEEN HIM AND HIS ATTORNEY; AND

WHEREAS, THE COURTS THROUGH THE COMMON LAW HAVE DEVELOPED SEVERAL EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE; AND

WHEREAS, THE LEGISLATURE DOES NOT INTEND BY THIS ACT TO ABOLISH, AMEND, OR OTHERWISE AFFECT ANY OTHER EXCEPTIONS TO THE ATTORNEY-CLIENT PRIVILEGE.

THEREFORE, THE LEGISLATURE OF THE STATE OF MONTANA FINDS IT APPROPRIATE TO AMEND THE STATUTE REGARDING ATTORNEY-CLIENT PRIVILEGE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 26-1-803, MCA, is amended to read:

"**26-1-803. Attorney-client privilege.** (1) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or his advice given ~~thereon~~ to the client in the course of professional employment.

(2) A client cannot, except voluntarily, be examined as to any communication made by him to his attorney or the advice given to him by his attorney in the course of the attorney's professional employment."

NEW SECTION. **Section 2.** Effective date. [This act] is effective on passage and approval.

-End-

DISPOSITION OF HOUSE BILL 413

Motion: Rep. Addy made a DO PASS motion, seconded by Rep. Nelson.

Discussion: None.

Amendments and Votes: None.

Recommendation and Vote: A vote was taken on the DO PASS motion and CARRIED with Rep.'s Daily, Brooke, Wyatt and Aafedt voting No.

HEARING ON HOUSE BILL 409

Presentation and Opening Statement by Sponsor:

Rep. Good, House District 36 stated that HB 409 is intended to clarify the Montana statute which establishes the attorney/client privilege. That privilege is intended to protect the confidentiality of a discussion between a lawyer and his client so that neither one of them can be forced to testify about the content of such discussion unless the client chooses to waive the protection of that privilege. As it is presently written the Montana statute exempts only the lawyer from giving such testimony and says nothing about exempting the client from testifying. Rep. Good stated that the purpose of HB 409 is to add language to the existing statute to make it clear that the attorney/client privilege is intended to exempt both the client and the lawyer from being required to give such evidence unless the client chooses to waive that privilege.

List of Testifying Proponents and What Group They Represent:

William Conklin, Montana Defense Trial Lawyers Assoc., Great Falls Attorney

List of Testifying Opponents and What Group They Represent:

None.

Testimony:

William Conklin, speaking on behalf of HB 409 stated that the Montana statute, as it is written, refers only to extracting testimony from the lawyer if he were called as a witness, it says nothing about extracting testimony from the client. Mr. Conklin stated that confidential communications between an attorney and

client are privileged and protected from inquiry when the client is a witness as well as when the attorney is a witness. A client cannot ordinarily be compelled to disclose communications which his attorney will not be permitted to disclose. This is true even though the statute on the subject excludes in terms only the attorney from testifying and makes no mention of the client. Mr. Conklin stated that our statute, by its wording allows misinterpretation. The proposed bill simply clarifies that this statute should be interpreted to apply to testimony by the client as well as testimony by the attorney. It is not intended to do anything other than continue the common law rule that protects and considers this kind of testimony to be extremely important to the attorney/client relationship.

Questions From Committee Members: Rep. Stickney stated that she assumed that this does not give the attorney the right to waive, as it does the client. Mr. Conklin responded that it does not. The attorney never has the right to waive. He is under an obligation to raise the attorney/client privilege of his client until such time the client waives it.

Rep. Aafedt asked how many states have adopted this particular law? Mr. Conklin stated that in terms of this precise language he did not know. As far as the attorney/client privilege, he did not think that there was any state in the Union that did not have it in full force.

Closing by Sponsor: Rep. Good closed.

DISPOSITION OF HOUSE BILL 409

Motion: Rep. Addy made a DO PASS motion, seconded by Rep. Eudaily.

Discussion: Rep. Aafedt commented that if every state in the Union has adopted this law as Mr. Conklin stated, then why is the bill being proposed? Rep. Mercer responded that if he read the Montana statute without the proposed bill, literally it speaks only to the attorney. All that is really being done is amending a statute so that it literally says what everyone thought it always said, and what every other state in the Union presently says.

Amendments and Votes: None.

Recommendation and Vote: A vote was taken on the DO PASS motion and CARRIED unanimously.

HEARING ON HOUSE BILL 386

Presentation and Opening Statement by Sponsor:

Rep. Knapp, House District 27 stated that the reason for presenting this bill is that during the last 4-5 years they have had several bankruptcy sales among farmers. This bill provides for the law to be split. The person selling the machinery pays for the taxes the first half, and the person buying the machinery pays for the taxes the second half of the year.

List of Testifying Proponents and What Group They Represent:

None.

List of Testifying Opponents and What Group They Represent:

None.

Testimony:

Ken Morrison, appearing before the committee as a neutral party offered to the committee proposed amendments for consideration of HB 386 (EXHIBIT 2).

Questions From Committee Members: Rep. Eudaily asked if it would make any difference when this act would go into effect? Mr. Morrison responded to Rep. Eudaily's question by stating that it would not make any difference.

Closing by Sponsor: Rep. Knapp responded that he was in support of the proposed amendments that Mr. Morrison presented.

DISPOSITION OF HOUSE BILL 386

Motion: A DO PASS motion was made by Rep. Knapp, motion seconded by Rep. Darko.

Discussion: None.

DAILY ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date February 3, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN	X		
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

February 3, 1989

Mr. Speaker: We, the committee on Judiciary report that House Bill 409 (first reading copy -- white) do pass .

Signed: _____

Dave Brown, Chairman

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. HOUSE BILL 409 DATE FEB. 3, 1989

SPONSOR REP. GOOD

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
William Conklin	Great Falls	409	
SUE WEINGARTNER	MT Defense Trial Lawyers - Helena	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Bruce D. Crippen, on March 1, 1989, at 10:00 a.m.

ROLL CALL

Members Present: Chairman Bruce Crippen, V. Chairman Al Bishop, Senators Tom Beck, Mike Halligan, Bob Brown, Joe Mazurek, Loren Jenkins, R. J. Pinsoneault, John Harp and Bill Yellowtail.

Members Excused: None

Members Absent: None

Staff Present: Staff Attorney Valencia Lane and Committee Secretary Rosemary

Announcements/Discussion: None

HEARING ON HOUSE BILL 409

Presentation and Opening Statement by Sponsor:
Representative Susan Good of Great Falls, District 36, opened the hearing saying the bill clarified attorney privileges pertaining to clients. She said the privilege goes both ways.

List of Testifying Proponents and What Group they Represent:

William Conklin, Great Falls attorney, himself
C. W. Leapart, Helena attorney, himself
Sue Weingartner, Montana Defense Trial Lawyers

List of Testifying Opponents and What Group They Represent:

Michael Sherwood, Montana Trial Lawyers Association

Testimony:

William Conklin said he requested the bill because of a decision given by Judge Hatfield in which the judge said the client could give information on the stand or when being deposed regarding conversations between the client and the attorney. The judge said the client could give information told to him by his attorney. The reason for the decision, said Mr. Conklin, was because the statute only mentioned the attorney in the confidentiality statute. He proposed adding language stating that the client could not be forced to testify unless he waived his right to the confidentiality. He said it was part of the common law and has always held to be law in the past. He read from an encyclopedia of law regarding same. He felt the client-attorney relationship would suffer because there would no longer be confidence in the confidentiality of conversations between the two.

C. W. Leapart stood in support of the bill. He felt if this bill had been written in statute, the decision would not have been made. He felt it was up to the legislature to legislate and it was the legislature's job to clarify this portion of the law.

Sue Weingartner testified in favor of the bill.

Michael Sherwood distributed Exhibit 1, pages 1 through 5, telling why he opposed the bill. His opposition was based on the "bad faith" situation.

Questions From Committee Members: Senator Pinsoneault asked how Mr. Conklin would answer Mr. Sherwood's opposition.

Mr. Conklin said that, if it is thought that the client attorney privilege ends with the case, it is a drastic departure from common law. He said he questioned the wisdom of the two cases that were cited.

Senator Pinsoneault said there were exceptions and Mr. Conklin said they were for fraud and criminal acts. The client may waive his confidentiality privilege if he so chooses, said Mr. Conklin.

Closing by Sponsor: Rep. Good closed the hearing.

DISPOSITION OF HOUSE BILL 409

Discussion: Senator Yellowtail questioned the "bad faith" objection. He also thought the bill seemed too broad.

Mr. Conklin said there were exceptions. Even if a client said "I did what my lawyer told me," that would be an exception, in addition to fraud and criminal, according to Conklin. He said common law exists at this time. Then, said Sen. Yellowtail, why must this be added to statute. Mr. Conklin answered because judges "sometimes make mistakes."

Amendments and Votes: There were none.

Recommendation and Vote: Senator Beck MOVED that HOUSE BILL 409 BE CONCURRED IN. The MOTION CARRIED by a vote of 9 to 1, with Senator Yellowtail voting NO.

HEARING ON HOUSE BILL 87

Presentation and Opening Statement by Sponsor:

Representative Tom Kilpatrick of Laurel, District #85, said the bill was requested by the Department of Family Services. He said the department receives approximately $170,000 in grants from the federal government. In order to continue receiving them, state law must come into compliance with federal law. This bill is to amend certain definitions within the child abuse, neglect and dependency law. With these definitions, the department would be allowed to proceed with civil actions to protect children who are victims of sexual abuse by their parents, guardians or other persons responsible for their care. According to Rep. Kilpatrick, the only controversial part was on page 4, line 13 and it was amended in the House to add "imminent or substantial". He said "substantial" would be necessary to meet federal statute requirements. (Additional information left with the secretary concerning the bill -- Exhibit 5)

List of Testifying Proponents and What Group they Represent:

John Madsen, Department of Family Services

List of Testifying Opponents and What Group They Represent:

Walt Dupea, himself

ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date 3-1-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN	✓		
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

EXHIBIT NO. 1
DATE 3-1-59
H. BILL NO. 409

Testimony of Michael J. Sherwood, MTLA
Opposing House Bill No. 409

While Section 26-1-803 only speaks to examination of the attorney, the Montana supreme court has long recognized that the privilege is applicable to examination of the client as well.

In Kuiper v. District Court , a 1981 decision, the plaintiff had brought an action against Goodyear tire. Kuiper had served requests for admission upon the defendant and had attempted to orally examine executives of Goodyear regarding letters that were sent to them from an attorney for the defendant company.

Goodyear sought and obtained a protective order from the district court . The supreme court upheld that order as it pertained to legal advice of counsel, even though it was employees of Goodyear who were being examined and not the attorney.

A narrow exception to that general rule has also been recognized in this state. The cases of In re Bergerson, 112 F.R.D. 692 (D. Mont 1986) and Silva v. Fire Insurance Exchange, 112 F.R.D. 699 (D. Mont. 1986) both stand for the proposition that when a "first party" bad faith action is prosecuted against an insurer for tortious failure to settle within the policy limits of a liability policy, communications between the insurer and an attorney who also represented the insured in the original tort action against the insured are not privileged with respect to the insured.

The MTLA is concerned that this attempt to fix something which does not appear to be broken may result in the elimination of this narrow exception.

Exh, p.2

SENATE JUDICIARY
EXHIBIT NO. 1, p. 2
DATE 3-1-89
BILL NO. SB 409

Memo:

To: Senator Bruce Crippen

From: Michael Sherwood, MTLA

Re: HB 409
(409)

Contrary to Mr. Conklins representations the attorney client issue was discussed in Kuper. I attach a copy of both head notes and text from that case.

Mike Sherwood

cc: Members Senate Judiciary Committee

EXHIBIT NO. 1, p. 2
DATE 3-1-89
BILL NO. HB 409

Dennis KUIPER, Relator and Appellant,

v.

The DISTRICT COURT OF the EIGHTH JUDICIAL DISTRICT OF the STATE OF MONTANA et al., Respondents.

No. 81-147.

Supreme Court of Montana.

Submitted June 10, 1981.

Decided Aug. 12, 1981.

Rehearing Denied Sept. 3, 1981.

Plaintiff served request for admission asking tire manufacturer to admit genuineness of documents in possession of both defendant and relator and sought by deposition to orally examine defendant's executives. The District Court granted protective order, thereby preventing relator from discovering documents and compelling answers. On relator's petition for writ of supervisory control, the Supreme Court, Morrison, J., held that: (1) order of trial court which prevented relator from using documents in relator's possession, for extrajudicial purposes, as well as in case of bar, had chilling effect upon First Amendment rights and would be subjected to close scrutiny; (2) no findings were made which would justify court order that "counsel for plaintiff are hereby prohibited from making any further use whatsoever of such privileged documents and exhibits in the action." and this portion of court's order unconstitutionally prescribed plaintiff's freedom of expression; (3) work product rule legitimately could form basis of protective order even though the "work product" was in possession of adverse party; and (4) public policy militated in favor of permitting discovery of facts surrounding "recall campaign" and investigation by National Highway Traffic Safety Administration.

Remanded.

1. Constitutional Law ⇐90.1(3)

Order of trial court which prevented relator from using documents in relator's possession, for extrajudicial purposes, as well as in case at bar, had chilling effect upon First Amendment rights and would be subjected to close scrutiny. U.S.C.A.Const. Amend. 1.

2. Pretrial Procedure ⇐136

Before trial court can enter protective order restraining free expression, court must find that harm posed by dissemination is substantial and serious, restraining order must be narrowly drawn and be precise and there must be no alternative means of protecting public interest which intrude less directly on expression.

3. Constitutional Law ⇐90.1(3)

Where no findings were made which justified court order that "counsel for plaintiff are hereby prohibited from making any further use whatsoever of such privileged documents and exhibits in this action," this portion of court's order unconstitutionally prescribed plaintiff's freedom of expression. U.S.C.A.Const. Amend. 1.

4. Witnesses ⇐219(3)

Defendant's response to court process did not constitute waiver of its right to assert that documents were privileged under attorney-client privilege and work-product rule.

5. Witnesses ⇐199(1)

Attorney-client privilege does relate to legal advice given by house counsel to corporate employer.

6. Pretrial Procedure ⇐357

Where contents of documents could not be accurately described as legal advice, documents were not protected by attorney-client privilege.

7. Pretrial Procedure ⇐387

Various exhibits, including communications between party not an attorney to liability carriers and liability carriers, were not protected by attorney-client privilege.

8. Witnesses ⇐198(2)

Work-product rule is broader in its application than attorney-client privilege, but it is not an absolute privilege; by its terms

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 3-1-89
BILL NO. HB409

cient to make this determination. Upon remand of this matter, the District Court is directed to hold a hearing with respect to evidence bearing upon the waiver question and to make findings accordingly.

The balance of our discussion concerning the attorney-client privilege and the application of the work product rule, will apply should the trial court find that a waiver has not occurred. If a waiver is found, then the existence of privilege is rendered moot.

The trial court's order dated March 13, 1981, granting a protective order to Goodyear, correctly identifies exhibit A as consisting of reports concerning closed product liability litigation prepared by Goodyear's in-house counsel. However, the order's reference to exhibit B as being a communication between house counsel Rigrish and other Goodyear personnel is inaccurate. Exhibit B is a brief note from a Goodyear employee denominated "Gerb" forwarding excerpts from a deposition taken in another "rim" case. Exhibits D and E are correctly identified as communications between house counsel Rigrish and other Goodyear personnel. The order mistakenly identifies exhibit J as being a communication between in-house lawyer Rigrish and Goodyear's liability carrier; exhibit J is a memorandum from one employee of a liability insurance company to another employee within the same company. Exhibit M is mistakenly identified in the order as a communication between lawyer Rigrish and Goodyear's liability carrier; exhibit M is a letter written by a representative of the Aetna Insurance Company addressed to Rigrish of Goodyear. Exhibits C, H, I, K and L are correctly identified in the order as being communications from Rigrish to liability insurance carriers. Exhibit G is correctly identified as a communication from Rigrish to retained counsel representing Goodyear in similar but unrelated litigation.

The subject matter and author of each exhibit is critical to determining whether attorney-client privilege is applicable. That privilege only applies statutorily in Montana to communications made by a client to his attorney and legal advice given in response thereto, during the course of professional employment. Section 26-1-803, MCA.

[5] Exhibit A is a compilation of case histories prepared by Rigrish for his superior at Goodyear. Attorney-client privilege does relate to legal advice given by house counsel to the corporate employer. *State ex rel. Union Oil Co. of Cal. v. District Court*,, supra.

[6] A careful study of each of the case histories contained in exhibit A shows that the contents of the document cannot be accurately characterized as "legal advice". Rigrish analyzed closed product liability files and reported to his superior the results obtained in each of those files. The files were closed at the time the document was prepared. The report was apparently made by Rigrish for the purpose of allowing his superior to evaluate his work and for the purpose of keeping corporate management advised about the history of product liability litigation. It is important to note that no legal advice is being given by Rigrish to his superior or corporate management with respect to pending litigation files. Under these circumstances the attorney-client privilege as statutorily defined in Montana, does not apply to exhibit A.

Exhibit B is correspondence from Goodyear personnel to Rigrish and, though the contents of the note are rather ambiguous, it would seem to be covered by attorney-client privilege. However, the enclosure appears to be deposition excerpts which would be part of the public record.

Exhibits D and E are letters from Rigrish to other Goodyear personnel. They appear to cover matters contemplated by the attorney-client privilege.

[7] Exhibits C, H, I, K and L are communications between Rigrish and personnel employed by Goodyear's liability carriers. Rigrish is not a lawyer for those liability carriers. There is no indication that the recipients of the communications are attorneys for Rigrish. Therefore, the attorney-client privilege does not apply to these documents.

EXHIBIT NO. 14
DATE 3-1-89
BILL NO. HB 409

Exhibit G is a communication from Goodyear to retained counsel. Exhibit G is clearly protected by the privilege. Exhibit J is a document prepared by an employee of the liability insurance company and forwarded to other personnel within the same insurance company. If any privilege exists, it exists for the benefit of that liability insurance company and would have to be claimed by that company.

Exhibit M is a communication from Aetna Insurance Company to Rigrish. Rigrish is not an attorney for Aetna Insurance Company and attorney-client privilege is, therefore, inapplicable.

Exhibits A, C, H, I, J, K, L and M are not covered by attorney-client privilege. Exhibits B, D, E and G may be protected.

[8, 9] The work product rule is broader in its application than the attorney-client privilege, but it is not an absolute privilege. By its terms the rule governs not only the attorney and his client, but also a party's representative, including his consultant, surety, indemnitor, insurer or agent. The rule protects materials prepared during litigation or in anticipation of litigation and provides for the disclosure of such material only upon a showing that the party seeking discovery has a substantial need for the material in preparation of the case and is unable, without undue hardship, to obtain the materials through other means. The rule further directs that the court protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Rule 26(b)(3), M.R.Civ.P., may afford protection to much of the documentary evidence here in dispute.

In applying the work product rule, we must make the following determinations: (1) Does the rule apply where material has been discovered and is in the possession of opposing counsel? (2) Does the rule apply to terminated litigation? (3) Does the rule apply where there is a claim but the reality of litigation may be very speculative?

[10–12] A literal interpretation of Rule 26(b)(3), M.R.Civ.P., would confine application of the rule to those instances where discovery is sought. Relator does not here seek discovery. Relator has possession of the subject documents and seeks only to lay foundation for those documents. We feel that the work product rule must be given a liberal interpretation in order to effectuate its purpose. The right granted under the rule can be waived and such a waiver will be the subject of the evidentiary hearing hereinbefore ordered. However, we here hold that the work product rule legitimately can form the basis of a protective order even though the "work product" is in the possession of the adverse party.

[13] The question of whether "terminated litigation" is contemplated by the work product rule, was determined in *In re Murphy* (8th Cir. 1977), 560 F.2d 326. In that case Chief Judge Gibson, writing for the court, said:

"In view of the *Hickman [v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451] rationale and the policies of Rule 26(b)(3), we conclude that the work product privilege applies to documents prepared in anticipation of terminated litigation. The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party. Counsel should be allowed to amass data and commit his opinions and thought processes to writing free of the concern that, at some later date, an opposing party may be entitled to secure any relevant work product documents merely on request and use them against his client. The work product privilege would be attenuated if it were limited to documents that were prepared in the case for which discovery is sought. What is needed, if we are to remain faithful to the articulated policies of *Hickman*, is a perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared. Any less protection

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-1-89 House Bill No. 409 Time

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK	✓	
SEN. BROWN	✓	
SEN. HALLIGAN	✓	
SEN. HARP	✓	
SEN. JENKINS	✓	
SEN. MAZUREK	✓	
SEN PINSONEAULT	✓	
SEN.YELLOWTAIL		✓
SEN. CRIPPEN	✓	
	9	1

Rosemary Jacoby
Secretary

Sen. Bruce Crippen
Chairman

Motion: Beck B CI passed

SF-3 (Rev. 1987)

HOUSE BILL 409

Discussion: Valencia Lane explained that she had prepared an amendment in a Preamble form, rather than using a statement of intent or putting the explanation in the minutes. She distributed the amendment to the committee. (See Exhibit 9.)

Mike Sherwood said the MTLA approved of her amendment.

Senator Halligan said he wanted it on the record that the amendments reflected common law.

Valencia said the amendment would appear in the bill, in the session laws and would be published in the annotations -- the blue binder that goes with the codes. It will not appear in the codes, she said.

Amendments and Votes: Senator Halligan MOVED adoption of the amendments in Ex. 9. Senator Harp MOVED a SUBSTITUTE MOTION to include it in the minutes. Senator Halligan's MOTION CARRIED by a vote of 5 to 4 with Senators Harp, Mazurek and Pinsoneault voting NO.

Recommendations and Votes: Senator Halligan MOVED that House Bill 409 BE CONCURRED IN AS AMENDED. The MOTION CARRIED UNANIMOUSLY.

ANNOUNCEMENTS: Chairman Crippen thanked Mike Sherwood and the Montana Trial Lawyers Association for hosting the luncheon following the Confirmation Hearings.

ADJOURNMENT

Adjournment At: 11:45 a.m.

SENATOR BRUCE D. CRIPPEN, Chairman

BDC/rj
minrj.306

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date 3-6-89

NAME	PRESENT	ABSENT	EXCUSED
SENATOR CRIPPEN	✓		
SENATOR BECK	✓		
SENATOR BISHOP	✓		
SENATOR BROWN			✓
SENATOR HALLIGAN	✓		
SENATOR HARP	✓		
SENATOR JENKINS	✓		
SENATOR MAZUREK	✓		
SENATOR PINSONEAULT	✓		
SENATOR YELLOWTAIL	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

March 6, 1989

MR. PRESIDENT:

We, your committee on Judiciary, having had under consideration HB 409 (third reading copy -- blue), respectfully report that HB 409 be amended and as so amended be concurred in:

Sponsor: Good (Halligan)

1. Page 1, line 9.

Insert: "WHEREAS, a majority of courts in the United States have broadly construed the attorney-client privilege as protecting the client as well as his attorney from being compelled to disclose their confidential communications; and

WHEREAS, the United States District Court for the District of Montana, in the recent case of Lane v. All Nation Insurance Company, CV-86-054-GF (June 17, 1987), strictly construed Montana's statute regarding attorney-client privilege to allow the client to be examined concerning his confidential communications with his attorney; and

WHEREAS, the Legislature intends to amend and clarify the Montana statute to make it clear that, contrary to the Lane decision, the attorney-client privilege extends to protect the client from being required to disclose confidential communications between him and his attorney; and

WHEREAS, the courts through the common law have developed several exceptions to the attorney-client privilege; and

WHEREAS, the Legislature does not intend by this act to abolish, amend, or otherwise affect any other exceptions to the attorney-client privilege.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the statute regarding attorney-client privilege."

AND AS AMENDED BE CONCURRED IN

Signed: _____

Bruce D. Crippen, Chairman

SENATE JUDICIARY
EXHIBIT NO. 9
DATE 3/6/89
BILL NO. HB409

Amendments to House Bill No. 409
Third Reading Copy (BLUE)

For the Committee on Judiciary

Prepared by Valencia Lane
March 2, 1989

1. Page 1, line 8.
Insert: "WHEREAS, a majority of courts in the United States have broadly construed the attorney-client privilege as protecting the client as well as his attorney from being compelled to disclose their confidential communications; and

WHEREAS, the United States District Court for the District of Montana, in the recent case of Lane v. All Nation Insurance Company, CV-86-054-GF (June 17, 1987), strictly construed Montana's statute regarding attorney-client privilege to allow the client to be examined concerning his confidential communications with his attorney; and

WHEREAS, the Legislature intends to amend and clarify the Montana statute to make it clear that, contrary to the Lane decision, the attorney-client privilege extends to protect the client from being required to disclose confidential communications between him and his attorney; and

WHEREAS, the courts through the common law have developed several exceptions to the attorney-client privilege; and

WHEREAS, the Legislature does not intend by this act to abolish, amend, or otherwise affect any other exceptions to the attorney-client privilege.

THEREFORE, the Legislature of the State of Montana finds it appropriate to amend the statute regarding attorney-client privilege."

ROLL CALL VOTE

SENATE COMMITTEE JUDICIARY

Date 3-6-89 House Bill No. 409 Time

NAME	YES	NO
SEN. BISHOP	✓	
SEN. BECK	✓	✓
SEN. BROWN		
SEN. HALLIGAN	✓	
SEN. HARP		✓
SEN. JENKINS	✓	
SEN. MAZUREK		✓
SEN PINSONEAULT		✓
SEN.YELLOWTAIL	✓	
SEN. CRIPPEN	✓	

~~6~~ 5 to ~~4~~

Rosemary Jacoby
Secretary

Sen. Bruce Crippen
Chairman

Motion: Amend - Halligan